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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91166487
Party	Plaintiff HASBRO, INC.
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Date	06/07/2010
Attachments	creative0.pdf (24 pages)(806975 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 78/359,895
Filed: January 30, 2004
For the Mark: MEMORY MAGIC in International Class 28
Published in the Official Gazette: May 10, 2005 at TM 330

HASBRO, INC.

Opposer,

v.

CREATIVE ACTION LLC,

Applicant.

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Opposition No. 91/166,487

**MOTION TO DECLARE MOOT APPLICANT'S FIRST REQUESTS FOR ADMISSION
OR TO REOPEN TIME OR AMEND ADMISSIONS**

In its motion for summary judgment, filed with the Board on May 27, 2010, Applicant Creative Action LLC ("Creative Action") argues that Opposer Hasbro, Inc. ("Hasbro") has admitted all requests in Creative Action's First Requests for Admission ("Requests") because Hasbro did not respond to such Requests before May 17, 2010. Hasbro believes the Requests were made moot by the Board's May 13, 2010 order, which made Hasbro's Amended Notice of Opposition ("Amended Notice") the operative complaint in these proceedings and, for at least the time being, the only operative pleading. However, in an abundance of caution and without prejudice to such argument, Hasbro served Creative Action with a response to the Requests on June 1, 2010.

Hasbro respectfully requests that the Board issue an order declaring that no such response was due, because Creative Action's Requests were made moot by the Board's May 13

order. If, however, the Board concludes that the Requests remained outstanding after the May 13 order, Hasbro requests that the Board accept Hasbro's June 1 response pursuant to Federal Rule of Civil Procedure 6(b) ("excusable neglect") or pursuant to Federal Rule of Civil Procedure 36(b) (no prejudice to the other party).

Because Creative Action relies upon Hasbro's alleged admissions in its motion for summary judgment, this motion is relevant thereto and, we respectfully submit, is not subject to the suspension of proceedings entered by the Board on June 3, 2010. (Docket # 60.)

I. CREATIVE ACTION'S REQUESTS WERE MADE MOOT BY THE BOARD'S MAY 13, 2010 ORDER.

On May 13, 2010, the Board granted Hasbro's motion for leave to file its Amended Notice and made clear that the Amended Notice is now the operative complaint in these proceedings. (Docket #58 at p. 9.) The Amended Notice substitutes wholly new claims for those brought in Hasbro's initial complaint. See id. (dismissing Hasbro's Section 2(d) claim with prejudice). As such, the Board granted Creative Action thirty days in which to file a new answer. Id. Creative Action has not yet filed an answer (or any counterclaims) in response to the Amended Notice.

The operative pleading is now principally that

[t]he identification of goods in the Application should be restricted under Section 18, 15 U.S.C. § 1068, to properly reflect the actual goods sold or intended to be sold by Applicant and the particular channels of trade and class of consumer for such goods as follows:

therapeutic activity kit intended for use by and direct sale to nursing homes and other elderly care facilities to promote the use of cognitive abilities by elderly persons with memory loss, comprised of cards that contain questions and related prompts for discussion, cards that contain an array of potential answers to the questions, and boards used by participants.

Amended Notice of Opposition ¶ 10. Related but secondary to that is a claim that “Applicant lacked the requisite bona fide intent to use the mark in commerce under 15 U.S.C. § 1051(b) on or in connection with the goods listed in the Application as of the filing date of the Application.” Id. 14. The secondary claim follows from the first because the application was filed as an intent to use one for goods that the Applicant never intended to sell.

A counterclaim raised in answer to a complaint becomes inoperative once an amended complaint is filed; the counterclaim must be re-pled in answer to the amended complaint in order to be pursued. See, e.g., General Mills, Inc. v. Kraft Foods Global, Inc., 495 F. 3d 1378, 1378-1379 (Fed. Cir. 2007) (on petition for rehearing) (affirming district court’s holding that defendant’s failure to answer amended complaint resulted in loss of counterclaim); Johnson v. Berry, 228 F.Supp.2d 1071, 1079 (E.D. Mo. 2002) (holding that failure to answer amended complaint and re-plead counterclaim resulted in abandonment of counterclaim). Creative Action’s counterclaims thus became inoperative upon entry of the Board’s May 13 order.¹

Creative Action’s Requests (Exhibit 1 to Creative Action’s Motion for Summary Judgment, Docket # 59) were issued to gather information in support of those now-inoperative counterclaims. The Requests are not relevant to any claims contained in Hasbro’s Amended Notice, and Creative Action has not yet filed an answer or any counterclaims in response to the Amended Notice. As such, following the Board’s May 13 order, there were **no operative pleadings** to which these Requests pertained and the requests became moot.

¹ The Board’s June 3, 2010, order suspending these proceedings appears to acknowledge this, even as it sets forth the Board’s decision to entertain Creative Action’s motion for summary judgment based on Creative Action’s evident intent to pursue the prior counterclaim, rather than require strict adherence to the rule. (Docket # 60 at pp.1-2: “**Notwithstanding that applicant’s motion for summary judgment was filed prior to the filing of an answer to the amended notice of opposition**, the filing of such motion clearly indicates that applicant does not intend to withdraw its counterclaim....”) (emphasis added). The Board’s June 3 order also noted that its prior order contemplated the proceeding re-commence from the beginning, with initial disclosures.

II. IF THE BOARD CONCLUDES THAT CREATIVE ACTION'S REQUESTS REMAINED OUTSTANDING FOLLOWING THE MAY 13 ORDER, THE BOARD SHOULD ACCEPT HASBRO'S RESPONSE PURSUANT TO TBMP RULE 509.01(B) AND FEDERAL RULE OF CIVIL PROCEDURE 6(B).

Creative Action argues that Hasbro's response to the Requests was due on May 17, 2010. Although Hasbro does not believe that it owed Creative Action a response to the Requests in light of the Board's May 13 order, Hasbro – in an abundance of caution and without prejudice to its argument that the Requests were made moot by that order – served a response to the Requests on June 1, 2010. If the Board concludes that Hasbro was mistaken and the Board's May 13 order did not moot the Requests, the Board should reopen Hasbro's time to respond pursuant to TBMP Rule 509.01(b) and Federal Rule of Civil Procedure 6(b), and accept Hasbro's June 1, 2010 response.

TBMP Rule 509.01(b) provides that, “[w]here the time for taking required action, as originally set or as previously reset, has expired, a party desiring to take the required action must file a motion to reopen the time for taking that action. The movant must show that its failure to act during the time previously allotted therefor was the result of excusable neglect.” (citing Fed. R. Civ. P. 6(b)). The rule further provides the analysis required to determine whether a party has shown excusable neglect:

The analysis to be used in determining whether a party has shown excusable neglect was set forth by the Supreme Court in Pioneer Investment Services Company v. Brunswick Associates Ltd. Partnership, 507 U.S. 380 (1993), adopted by the Board in Pumpkin Ltd. v. The Seed Corps, 43 USPQ2d 1582 (TTAB 1997). These cases hold that the excusable neglect determination must take into account all relevant circumstances surrounding the party's omission or delay, including (1) the danger of prejudice to the nonmovant, (2) the length of the delay and its potential impact on judicial proceedings, (3) the reason for the delay, including whether it was within the reasonable control of the movant, and (4) whether the movant acted in good faith.

Id. A reasonable balance of the factors would quickly show that the slightly delayed responses should be accepted; indeed, all factors in this analysis favor a finding of excusable neglect.

A. Hasbro Acted In Good Faith on its Reasonable Belief.

Even if the Board determines that Hasbro was mistaken in its belief that the Requests were made moot by the Board's May 13 order, Hasbro's belief was nonetheless reasonable and held in good faith. Based on the Board's prior orders granting stays of the proceedings and resetting discovery schedules,² Hasbro also reasonably and in good faith believed that it had thirty days in which to determine if a response to the Requests was required and, if so, to serve such a response. Where a party acts in good faith on an incorrect but reasonable belief, excusable neglect may be found. Conopco, Inc. v. Huff, 2004 WL 1799922, at *3-4 (TTAB Aug. 20, 2004) (reasonableness of belief central to excusable neglect analysis); Feltner v. The Title Search Co., 165 F.3d 32, 1998 WL 636773, at *5 (7th Cir. Sept. 2, 1998) (upholding finding of excusable neglect where party's mistaken belief was reasonable).

B. A 15-Day Delay Would Neither Impact These Proceedings, Nor Prejudice Creative Action.

Most importantly, a delay of merely 15 days during the pre-trial discovery period would neither impact these proceedings nor cause any prejudice to Creative Action.

² See Order dated Aug. 4, 2006 (Docket # 19) suspending the proceedings ("The parties are allowed THIRTY DAYS from resumption in which to serve responses to any outstanding discovery requests."); Order dated Mar. 5, 2007 (Docket # 21) suspending the proceedings ("The parties are allowed THIRTY DAYS from resumption in which to serve responses to any outstanding discovery requests"); Order dated Sept. 7, 2007 (Docket # 23) suspending the proceedings ("If there is no word from either party concerning the progress of their negotiations by March 2, 2007, proceedings herein will resume automatically without further action by the Board on March 3, 2007. The parties will be allowed until April 2, 2007 to serve responses to any outstanding written discovery requests."); Order dated Oct. 23, 2008 (Docket # 35) suspending the proceedings ("If there is no word from either party concerning the progress of their negotiations by April 21, 2009, proceedings herein will resume automatically without further action by the Board on April 22, 2009. The parties will be allowed until May 22, 2009 to serve responses to any outstanding written discovery requests.").

TBMP Rule 509.01(b) makes clear that “[t]he ‘prejudice to the nonmovant’ contemplated under the first Pioneer factor must be more than the mere inconvenience and delay caused by the movant’s previous failure to take timely action, and more than the nonmovant’s loss of any tactical advantage which it otherwise would enjoy as a result of the movant’s delay or omission.” Id. Rather, “prejudice to the nonmovant” must consist of “prejudice to the nonmovant’s ability to litigate the case, e.g., where the movant’s delay has resulted in a loss or unavailability of evidence or witnesses which otherwise would have been available to the nonmovant.” Id., citing Pumpkin Ltd. at 1587.

Nothing remotely close to such prejudice exists in this case. Creative Action has been aware, throughout these proceedings, that Hasbro contests the central allegation of Creative Action’s counterclaims – that the word MEMORY is generic or incapable of functioning as a trademark for card matching games. (See Hasbro’s Answer to Counterclaims, Docket # 11 at ¶¶ 30, 31.) Moreover, Creative Action’s own motion for summary judgment implicitly acknowledges that it does not truly believe that Hasbro conceded that MEMORY is commonly descriptive (generic); if Creative Action believed Hasbro made such a concession, Creative Action would have had no reason to discuss further evidence in support of its motion. (See Docket # 59.)

There is no reason to believe that the passage of 15 days between May 17, 2010 and June 1, 2010, resulted in the “unavailability of evidence or witnesses which otherwise would have been available” to Creative Action. As such, if the Board determines that Hasbro was mistaken in its belief that the Requests were made moot by the Board’s May 13, the Board should find that Hasbro’s delay in filing its response was the result of excusable neglect.

III. IN THE ALTERNATIVE, THE BOARD SHOULD ACCEPT HASBRO'S RESPONSE PURSUANT TO TBMP RULE 525 AND FEDERAL RULE OF CIVIL PROCEDURE 36(B).

In the alternative, if the Board concludes that its May 13 order did not moot the Requests and that Hasbro's reliance on its contrary belief did not amount to excusable neglect, the Board should allow Hasbro to amend its effective admissions pursuant to TBMP Rule 525 and Federal Rule of Civil Procedure 36(b).

TBMP Rule 525 provides that: "The Board, upon motion, may permit withdrawal or amendment of an admission when the presentation of the merits of the proceeding will be subverted thereby, and the propounding party fails to satisfy the Board that withdrawal or amendment will prejudice said party in maintaining its action or defense on the merits." (citing Fed. R. Civ. P. 36(b)); see also Hobie Designs Inc. v. Fred Hayman Beverly Hills Inc., 14 U.S.P.Q.2d 2064, 2065 (TTAB 1990); Johnston Pump/General Valve Inc. v. Chromalloy American Corp., 13 U.S.P.Q.2d 1719, 1721 (TTAB 1989); BankAmerica Corp. v. International Travelers Cheque Co., 205 U.S.P.Q. 1233, 1235 (TTAB 1979); and American Automobile Ass'n (Inc.) v. AAA Legal Clinic of Jefferson Crooke, P.C., 930 F.2d 1117, 19 U.S.P.Q.2d 1142, 1144 (5th Cir. 1991). This rule furthers a tenet underlying the Federal Rules of Civil Procedure – that cases should be decided on their merits wherever possible. See Work 'N Gear, LLC v. Work-N-Wear, Inc., 2006 WL 833977, at *2 (TTAB Mar. 27, 2006) (citing Johnston Pump/General Valve, Inc. v. Chromalloy American Corp., 18 USPQ2d 1719 (TTAB 1989)).

**A. Presentation of the Merits Will Be Served
By Allowing Hasbro to Amend its Admissions.**

In this case, the presentation of the merits would be subverted by allowing Hasbro to amend its admissions by means of its June 1, 2010, Response. The Requests go to the heart of Creative Action's initial counterclaims. (See Ex. 1 to Creative Action's motion for summary

judgment, Request for Admission No. 33: “The term ‘memory’ is the common descriptive name for a card-matching game.”) Hasbro’s June 1 Response denies many of the Requests, including Request No. 33. Hasbro thus satisfies the first prong of the test for amendment of admissions. See, e.g., Conopco, Inc. at * 7 (first part of test satisfied and motion to amend granted where “the matters admitted are clearly relevant to petitioner's claim that respondent's mark is merely descriptive of the identified goods, and allowing relief from the effective admission will enhance development of merits”) (internal citation omitted); Giersch v. Scripps Networks, Inc., 85 U.S.P.Q.2d 1306, 2007 WL 1653585, at *3 (TTAB Jun. 6, 2007) (first part of test satisfied and motion to amend granted where respondent submitted a response denying “many of the previously admitted facts,” “thereby demonstrating that the supposedly admitted matters are actually disputed.”).

B. Allowing Hasbro to Amend its Effective Admissions Would Not Prejudice Creative Action.

Allowing Hasbro to amend its affective admission also would not cause any prejudice to Creative Action. As noted above, the Creative Action has been aware, throughout these proceedings, that Hasbro believes MEMORY is neither commonly descriptive nor generic. Furthermore, the Board’s May 13 order extended the discovery period in this proceeding through July 15, 2010, providing Creative Action with ample opportunity to take additional discovery on this point, if relevant and if it desires to do so. The Board has regularly concluded that no prejudice exists where the requesting party has the opportunity to take additional discovery on the subject matter addressed by its requests for admissions. See, e.g., Hobie Designs, Inc. at 2065 (“Opposer's testimony period has not yet opened.... Any possible prejudice to opposer can therefore easily be overcome by extending the discovery period, which we intend to do.”); Giersch at *4 (TTAB Jun. 6, 2007) (“The case is ... in the pre-trial stage, and any potential

prejudice can be mitigated by extending the discovery period as necessary to permit petitioners to take any additional follow-up discovery based on respondent's amended admissions.”); Apple Computer, Inc. v. Suncoast Merchandise Corp., 2007 WL 261102, at *2 (TTAB Jan. 23, 2007) (“[A]pplicant will not be prejudiced by allowing the withdrawal of its admissions and the replacement thereof with its later served responses inasmuch as discovery is open and will be extended.”).

Accordingly, if the Board concludes that its May 13 order did not moot the Requests and that Hasbro’s reliance on its contrary belief did not amount to excusable neglect, the Board should allow Hasbro to amend its effective admissions pursuant to TBMP Rule 525 and Federal Rule of Civil Procedure 36(b).

Dated: June 7, 2010

Respectfully submitted,




Kim J. Landsman
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(212) 336-2000

Attorneys for Opposer Hasbro, Inc.

ELECTRONIC MAILING CERTIFICATE


I hereby certify that the **Motion to Declare Moot Applicant's First Requests for Admission or to Reopen Time or Amend Admissions** is being submitted electronically through the Electronic System for the Trademark Trial and Appeal Board ("ESTTA") on this 7th day of June, 2010.


Lorri Emanu

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing **Motion to Declare Moot Applicant's First Requests for Admission or to Reopen Time or Amend Admissions** was served by electronic mail on June 7, 2010, on the following counsel for the Applicant:

Wayne D. Porter Jr., Esq.
porter@porterpatentlaw.com


Claire D. Frost

**ATTACHMENT: OPPOSER'S RESPONSE TO APPLICANT'S
FIRST REQUESTS FOR ADMISSION**

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

In the Matter of Application Serial No. 78/359,895
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HASBRO, INC.

Opposer,

v.

CREATIVE ACTION LLC,

Applicant.

Opposition No. 91/166,487

**OPPOSER'S RESPONSE TO APPLICANT'S
FIRST REQUESTS FOR ADMISSION**

Pursuant to Rule 36 of the Federal Rules of Civil Procedure and 37 C.F.R.

§ 2.120, Opposer Hasbro, Inc. ("Opposer"), by its counsel, Patterson Belknap Webb & Tyler LLP, herewith responds to Applicant's First Requests for Admission to Opposer. Opposer's response is made notwithstanding its belief, and without prejudice to any argument, that Applicant's First Requests for Admission were made moot by the Board's recent order concerning Opposer's Amended Notice of Opposition.

GENERAL OBJECTIONS

A. Opposer objects to Applicant's Requests for Admission to the extent they seek to impose obligations in addition to or different from those embodied in 37 C.F.R. § 2.120 and Fed. R. Civ. P. 36.

B. Opposer objects to the Requests to the extent they seek information that is irrelevant or immaterial and is not reasonably calculated to lead to the discovery of admissible evidence.

C. Opposer objects to the Requests to the extent they seek information already publicly available, already in Applicant's possession, custody or control, or already provided to, or more easily obtainable by, Applicant.

D. Opposer objects to the Requests to the extent they assume disputed facts or legal conclusions in the definitions or in the description of the documents requested. Any information produced by Opposer with respect to any such request is made without prejudice to this objection and shall not constitute agreement with or waiver of any objection to such disputed facts or legal conclusions.

E. Opposer submits these objections and responses without conceding the relevance or materiality of the subject matter of any Request, response, or document produced.

F. The responses herein are based on Opposer's current knowledge and belief, and Opposer reserves the right to supplement, amend, modify, or correct these responses should additional information become available.

G. All responses herein are made on an express reservation of the General Objections set forth above and any specific objections set forth below.

REQUEST NO. 1

Exhibit A is a true and correct photocopy of the Memorandum and Decision of United States District Judge William E Smith filed on July 31, 2007 in *Hasbro, Inc. v. MGA Entertainment, Inc.*, Case No. 1:06-CV-00262-S-DLM.

RESPONSE:

Opposer admits that Exhibit A appears to be a photocopy of a Memorandum and Decision Judge William E Smith dated July 31, 2007, in *Hasbro, Inc. v. MGA Entertainment, Inc.*, Case No. 1:06-CV-00262-S-DLM was subsequently vacated in a final judgment entered October 3, 2008, and otherwise denies.

REQUEST NO. 2

The evidence relied on by Judge Smith in Exhibit A attached hereto, and set forth at pages 13 through 17 therein, is genuine.

RESPONSE:

Opposer can neither admit nor deny this as the “evidence” referred to on those pages of is of many varieties, the request is vague and Hasbro questions what “genuine” means in this context, and Hasbro had numerous objections and arguments against the "evidence" that MGA put forward.

REQUEST NO. 3

Exhibit B is a true and correct photocopy of pages in a book entitled “The Game Book,” published in 1946.

RESPONSE:

Opposer admits that Exhibit B appears to be a photocopy of a few pages taken from a book entitled “The Game Book,” that bears a copyright notice date of 1946, but the exhibit is incomplete, and Hasbro therefore denies the authenticity of the exhibit.

REQUEST NO. 4

Exhibit C is a true and correct photocopy of pages in a book entitled “The New Complete Hoyle – The Official Rules of All Popular Games of Skill and Chance,” published in 1956.

RESPONSE:

Opposer admits that Exhibit C appears to be a photocopy of a few pages in a book entitled "The New Complete Hoyle – The Official Rules of All Popular Games of Skill and Chance," that bears copyright notice dates of 1947, 1956, and 1964, but the exhibit is incomplete, and Hasbro therefore denies the authenticity of the exhibit.

REQUEST NO. 5

Exhibit D is a true and correct photocopy of pages in a book entitled "Goren's Hoyle – Encyclopedia of Games," published in 1961.

RESPONSE:

Opposer admits that Exhibit D appears to be a photocopy of a few pages in a book entitled "Goren's Hoyle – Encyclopedia of Games," that bears copyright notice dates of 1961, 1950, but the exhibit is incomplete, and Hasbro therefore denies the authenticity of the exhibit.

REQUEST NO. 6

Exhibit E is a true and correct photocopy of pages in a book entitled "The Random House Dictionary of the English Language," published in 1987.

RESPONSE:

Opposer denies inasmuch as the Exhibit is too cut off and incomplete to be able to tell what it is and where it is from.

REQUEST NO. 7

Exhibit F is a true and correct photocopy of pages in a book entitled "Random House Webster's Unabridged Dictionary," published in 2001.

RESPONSE:

Opposer denies inasmuch as the Exhibit is too cut off and incomplete to be able to tell what it is and where it is from.

REQUEST NO. 8

Exhibit G is a true and correct photocopy of pages printed from the website [http://en.wikipedia.org/wiki/concentration_\(game\)](http://en.wikipedia.org/wiki/concentration_(game)).

RESPONSE:

Opposer admits that Exhibit G appears to be a photocopy of pages printed from the website [http://en.wikipedia.org/wiki/concentration_\(game\)](http://en.wikipedia.org/wiki/concentration_(game)).

REQUEST NO. 9

Exhibit H is a true and correct copy of pages printed from the website <http://www.allstarpuzzles.com/memory/index.html>, bearing the following notice: "Copyright © 2002-2009 All-Star Puzzles. All rights reserved."

RESPONSE:

Opposer admits that Exhibit H appears to be a copy of pages printed from the website <http://www.allstarpuzzles.com/memory/index.html>.

REQUEST NO. 10

Exhibit I is a true and correct copy of pages printed from the website <http://boardgames.about.com/od/cardgames/a/concentration.htm>.

RESPONSE:

Opposer admits that Exhibit I appears to be a printout from the website <http://boardgames.about.com/od/cardgames/a/concentration.htm>.

REQUEST NO. 11

Exhibit J is a true and correct copy of pages printed from the website <http://gifts.barnesandnoble.com>.

RESPONSE:

Opposer denies, inasmuch as that url does not appear to direct one to any webpage at all.

REQUEST NO. 12

Exhibit K is a true and correct copy of pages printed from the website <http://www.ssw.com/product>.

RESPONSE:

Opposer denies, inasmuch as that url does not bring up the webpage attached as Exhibit K.

REQUEST NO. 13

Exhibit L is a true and correct copy of pages printed from the website <http://www.dltk-cards.com/memory/index.htm>.

RESPONSE:

Opposer admits that Exhibit L appears to be a printout from the website <http://www.dltk-cards.com/memory/index.htm>.

REQUEST NO. 14

Exhibit M is a true and correct copy of pages printed from the website <http://www.hasbro.com/shop/details>, bearing the following notice: "© 2008 Hasbro Terms and Conditions."

RESPONSE:

Opposer denies, inasmuch as that url does not bring up the webpage attached as Exhibit M.

REQUEST NO. 15

In its website, Hasbro has referred to handheld games which require card-matching skills as “memory games.”

RESPONSE:

Opposer denies knowledge of any such reference.

REQUEST NO. 16

In its website, Hasbro has referred to handheld games which require card-matching skills as “memory games,” but such handheld games are unrelated card-matching games sold by Hasbro having the word “memory” in their titles.

RESPONSE:

Opposer denies knowledge of any such reference.

REQUEST NO. 17

The 1963 “Webster’s Third” dictionary defines the word “concentration.”

RESPONSE:

Opposer sufficient knowledge to admit or deny, inasmuch as there are a number of dictionaries that use the name “Webster’s” and it is not clear to what the request refers.

REQUEST NO. 18

The 1963 “Webster’s Third” dictionary provides the following definition for the word “concentration”:

“**con-cen-tra-tion ... 5:** a card game for two or more players in which a pack of cards is laid out card by card face down and at random, the skill of the game consisting of remembering the position of such cards as are briefly turned up in play – called also *memory*.”

RESPONSE:

Opposer lacks sufficient knowledge to admit or deny, inasmuch as there are a number of dictionaries that use the name "Webster's" and it is not clear to what the request refers. Opposer also denies that the quote is the definition inasmuch as what is quoted in the request is shown to be an excerpt.

REQUEST NO. 19

The 1963 "Webster's Third" dictionary provides a definition for the word "concentration" substantially as follows:

"con-cen-tra-tion ... 5: a card game for two or more players in which a pack of cards is laid out card by card face down and at random, the skill of the game consisting of remembering the position of such cards as are briefly turned up in play – called also *memory*."

RESPONSE:

Opposer sufficient knowledge to admit or deny, inasmuch as there are a number of dictionaries that use the name "Webster's" and it is not clear to what the request refers. Opposer also denies the request inasmuch as the quote is obviously excerpted, appears to be the fifth listed definition, and therefore is not the "substantial" definition.

REQUEST NO. 20

Milton Bradley Company sells a game named "Shenanigans."

RESPONSE:

Opposer denies.

REQUEST NO. 21

Milton Bradley Company first sold the game "Shenanigans" in 1964.

RESPONSE:

Opposer lacks sufficient knowledge or information to admit or deny the request.

REQUEST NO. 22

In Milton Bradley's game "Shenanigans, an aspect of the game is called "memory game."

RESPONSE:

Opposer lacks sufficient knowledge or information to admit or deny the request, inasmuch as Opposer has no sample of the game as alleged.

REQUEST NO. 23

In Milton Bradley's game "Shenanigans," an aspect of the game is called "memory game" and refers to a card-matching game.

RESPONSE:

Opposer lacks sufficient knowledge or information to admit or deny the request, inasmuch as Opposer has no sample of the game as alleged.

REQUEST NO. 24

Exhibit N, attached hereto, contains an authentic reproduction of a portion of the packaging of Milton Bradley Company's game "Shenanigans."

RESPONSE:

Opposer lacks sufficient knowledge or information to admit or deny the request, inasmuch as Opposer has no sample of the game as alleged.

RESPONSE NO. 25

At least one company other than Hasbro sells a game that uses the term "memory" in its title.

RESPONSE:

Admits.

RESPONSE NO. 26

At least one company other than Hasbro sells a game that uses the term “memory” on its packaging.

RESPONSE:

Admits.

REQUEST NO. 27

At least one company other than Hasbro sells a game that uses the term “memory” in its title in reference to a card-matching game.

RESPONSE:

Admits.

REQUEST NO. 28

At least one company other than Hasbro sells a game that uses the term “memory” on its packaging in reference to a card-matching game.

RESPONSE:

Admits.

REQUEST NO. 29

At least one company other than Hasbro sells a game that uses the term “memory” in its title, which game is sold in the same stores where a Hasbro game having the word “memory” in its title is sold.

RESPONSE:

Opposer lacks sufficient information to admit or deny the request.

REQUEST NO. 30

At least one company other than Hasbro sells a game that uses the term “memory” on its packaging, which game is sold in the same stores where a Hasbro game having the word “memory” in its title is sold.

RESPONSE:

Opposer lacks sufficient information to admit or deny the request.

REQUEST NO. 31

At least one company other than Hasbro sells a game that uses the term “memory” in its title or on its packaging, which game is sold in the same stores where a Hasbro game having the word “memory” in its title is sold.

RESPONSE:

Opposer lacks sufficient information to admit or deny the request.

REQUEST NO. 32

The term “memory” is used in conjunction with internet card-matching games.

RESPONSE:

Admitted.

REQUEST NO. 33

The term “memory” is the common descriptive name for a card-matching game.

RESPONSE:

Denies.

Dated: June 1, 2010

Respectfully submitted,

A handwritten signature in cursive script that reads "Kim J. Landsman". The signature is written in black ink and includes a long, sweeping horizontal flourish at the end.

Kim J. Landsman, Esq.
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(212) 336-2000

Attorneys for Opposer Hasbro, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 1, 2010, I served Opposer's Response to Applicant's First Requests for Admission upon the following individual by transmitting a true copy of said document via electronic mail to:

Wayne D. Porter Jr., Esq.

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Attorneys for Opposer Hasbro, Inc.

Dated: June 7, 2010
New York, New York